No. 15,655

IN THE

United States Court of Appeals

For the Ninth Circuit

VIRGIL D. DARDI, Individually and as Executor of the Estate of Umberto Dardi,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF FOR APPELLANT.

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SUMMARY OF ARGUMENT.

The only issue presented in this case is whether a waiver executed by a transferor taxpayer, extending the normal six-year period for collection of tax after assessment, extends the period for collection proceedings against a transferee. In considering this issue a clear distinction must be made between extensions of the period for assessment of tax and extensions of the period for collection proceedings after assessment.

The attempted analogy between extensions of the period for assessment and extensions of the period for collection after assessment is not valid, and cases in-

volving the former period do not support the District Court's decision in this case, which involves only the latter period. The issue of this case has been considered in only one reported decision, *United States v. City of New York* (S.D. N.Y., 1955), 134 F. Supp. 374. The case was incorrectly decided and should not be followed.

There is, moreover, no evidence of any established administrative practice, as alleged by appellee, which supports the Government's position in this case. None of the cases cited by the appellee as evidence of such a practice relates to the issue presented in this case, and the case of *United States v. Markowitz* (N.D. Cal., 1940), 34 F. Supp. 827, may well indicate a contrary practice.

The rule that statutes of limitation barring the collection of taxes should be liberally construed in favor of the taxpayer, which has been acknowledged by the Supreme Court and by this Court, still stands, and it has not been changed by any decisions subsequent to those upon which we rely.

ARGUMENT.

I. THE ISSUE PRESENTED IN THIS CASE RELATES ONLY TO THE PERIOD FOR COLLECTION, AND NOT TO THE PERIOD FOR ASSESSMENT OF TAX.

This appeal presents but one issue: When the transferor taxpayer, The Mission Company, executed a waiver extending the normal six-year period for collection of the tax previously assessed against that tax-

payer, did it thereby also extend the period for collection from appellant as a transferee?

The case presents no issue concerning an extension of the time for assessment of tax, since appellant has never claimed that the assessment was barred. However, since appellee appears to confuse the issue, citing cases which involve only the period for assessment in support of the District Court's decision in this case, it may be helpful to make quite clear the distinction between the two periods.

Under Section 275(a) of the Internal Revenue Code of 1939, income taxes must ordinarily be assessed within three years after the return was filed. This section provides:

> "General Rule.—The amount of income taxes imposed by this chapter shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period."

Under Section 276(c), which is set forth at page 5 of appellant's opening brief, a Court proceeding to collect taxes is ordinarily barred unless commenced within six years after assessment. This is a separate period of limitation, which commences to run when the assessment is made.

Either of these periods may be extended by an appropriate agreement in writing between the Commissioner and the taxpayer, executed prior to the expiration of the period in question. Such agreements are commonly referred to as waivers. Waivers extending

the period for *assessment* are authorized under Section 276(b), while waivers extending the period for *collection* are authorized by Section 276(c).

Under Section 311(b)(1) of the 1939 Code, which is set forth at page 13 of appellant's opening brief, the period of limitation for assessment of tax against an initial transferee is "one year after the expiration of the period of limitaiton for assessment against the taxpayer." Since this one-year period does not commence to run until the expiration of the period for assessment against the transferor taxpayer, it is necesarily extended by waivers executed by the taxpayer extending that period. Appellee cites numerous cases which so hold, and with these we have no quarrel.

However, the period of limitations for assessment of tax is not an issue in this case. No assessment was ever made against appellant; the only assessment of these taxes was against The Mission Company, on October 10, 1947, and no action was taken to establish appellant's liability as a transferee until this suit was commenced on December 15, 1954. (By that time, it may be assumed, any assessment against appellant was barred by Section 311(b), and the Government could proceed, if at all, only by a suit in equity.)

The period of limitation involved here is that which bars a Court proceeding to collect tax if it is begun more than six years after assessment of the tax (Section 276(c)). The question is whether a waiver by the primary taxpayer, extending that six-year period for collection, also extended the period for a Court proceeding against appellant as transferee.

II. THE ATTEMPTED ANALOGY BETWEEN EXTENSIONS OF THE PERIOD FOR ASSESSMENT AND EXTENSIONS OF THE PERIOD FOR COLLECTION AFTER ASSESSMENT IS NOT VALID.

To the best of appellant's knowledge, the only reported decision which is squarely on the issue presented here is *United States v. City of New York, et al.* (S.D. N.Y., 1955), 134 F. Supp. 374, which is discussed in appellant's opening brief at pages 10 to 15, inclusive. None of the cases cited by appellee at pages 17 to 21 of its brief involved the issue of this case. On the contrary, all of those cases involved extensions of the period of limitation for *assessment*, as distinguished from *collection after assessment,* and they are in point only if an argument by analogy is not valid. It is appellant's position that the attempted analogy is not valid.

Appellee apparently relies on the supposed analogy, but without answering appellant's arguments on this point or explaining why it considers the analogy sound.

The decision in *City of New York* was expressly based upon this supposed analogy. There the Court said:

> "There are analogous situations under the Code where voluntary unilateral action by the taxpayer-transferor tolls the statutory period as against his transferee. For example, an appeal to the Tax Court by the taxpayer suspends the limitation period—it also suspends the period for suits against his transferee. *Likewise a waiver agreement executed by the transferor extending the limitation period for assessments is valid as*

against his transferees." (Italics added.) 134 F. Supp. at page 378.

The obvious difference is that the period of limitation for assessment against a transferee is, by statute, directly related to the period for assessment against his transferor, while the period for collection proceedings against a transferee is not similarly related to the period for collection proceedings against his transferor. Under Section 311(b)(1) of the 1939 Code the period for assessment against a transferee does not commence to run until "the expiration of the period of limitation for assessment against the taxpayer." The Courts have properly held that any action by the primary taxpayer which extends the period for assessment against him delays the commencement of the period for assessment against his transferee, and thus extends that period.

There is no parallel relationship between the period of limitation for collection proceedings against the taxpayer and the period for such proceedings against his transferee. Section 276(c), which establishes the period of limitation for collection proceedings, makes no reference to transferees, providing generally that income tax may be collected by a proceeding in Court only if such proceeding is begun within six years after the assessment of the tax, or prior to the expiration of any extension of that period agreed upon in writing by the Commissioner and "the taxpayer".

The *Updike* and *Markowitz* cases, cited at page 6 of appellant's opening brief, make it clear that a suit against a transferee is subject to this six-year period

of limitation, and that the term "the taxpayer" in Section 276(c) must be understood to refer to the transferee, as well as to the transferor taxpayer. *Markowitz* held that a waiver signed by the transferee satisfied the requirement of an agreement by "the taxpayer", and extended the period for suit under 276(c).

Other reasons for concluding that the attempted analogy is invalid are argued at pages 14 and 15 of appellant's opening brief, and need not be repeated here.

III. THERE IS NO EVIDENCE IN THIS CASE OF ANY ADMINISTRATIVE PRACTICE REGARDING EXTENSIONS OF THE PERIOD FOR COLLECTION OF TAX.

Appellee urges that its position in this case is supported by an established administrative practice (Br. 17). But there is no evidence in this case of any such practice, nor do the cases cited by appellee in support of this proposition indicate any such practice. All of those cases relate exclusively to the period of limitation for *assessment,* as distinguished from the period for *collection after assessment.*

In answer to appellant's argument distinguishing between extensions of the two statutory periods, appellee calls particular attention to *Rite-Way Products, Inc. v. Commissioner* (1949), 12 T.C. 475 (Br. 18). However, that case, like the others cited by appellee, involved waivers extending the period for assessment. The reference in the quoted portion of the Tax Court's opinion (Br. 18) to consents extending "the period

of limitations for assessment and collection" clearly has to do with waivers authorized under Section 276(b), and not with waivers extending the period for collection after assessment, authorized under Section 276(c), which are at issue in this case.

The case of *United States v. Markowitz* (N.D. Cal., 1940), 34 F. Supp. 827, which is cited and discussed in both appellant's opening brief (pp. 6, 12) and appellee's brief (p. 23), may well indicate an administrative practice of extending the period for collection after assessment by obtaining waivers from transferees, and not relying upon waivers executed by transferor taxpayers.

IV. STATUTES OF LIMITATION BARRING THE COLLECTION OF TAXES SHOULD BE LIBERALLY CONSTRUED IN FAVOR OF THE TAXPAYER.

In our opening brief we argued (pp. 11-12) that statutes of limitation barring the collection of taxes are to be construed liberally in favor of the taxpayer, and that Judge Weinfeld was mistaken in stating a contrary rule of law in *City of New York.* Appellee takes issue with this (Br. 16), and maintains that the rule was correctly stated in *City of New York.*

In support of our position we cited three cases:

Bowers v. New York & Albany Company (1927), 273 U.S. 346, 47 S.Ct. 389;

United States v. Updike (1930), 281 U.S. 489, 50 S.Ct. 367;

Commissioner v. Bryson (C.A. 9, 1935), 79 F. 2d 397.

In each of these cases the Court acknowledged the rule that provisions of limitations embodied in taxing acts are to be construed liberally in favor of the taxpayer.

In contending to the contrary, appellee cites four cases and quotes from Mertens, Law of Federal Income Taxation (Br. 16, 17). Appellee relies upon the following cases:

DuPont de Nemours & Co. v. Davis (1924), 264 U.S. 456, 44 S.Ct. 364;

Pacific Coast Steel Co. v. McLaughlin (C.A. 9, 1932), 61 F. 2d 73, affirmed 288 U.S. 426;

McCarthy Co. v. Commissioner (C.A. 9, 1935), 80 F. 2d 618, cert. den. (1936), 298 U.S. 655;

and

Loewer Realty Co. v. Anderson (C.A. 2, 1929), 31 F. 2d 268, cert. den. 280 U.S. 558, 50 S.Ct. 17.

The *DuPont* case is immediately distinguishable, since it did not involve a tax statute. In that case the Government's Director-General of Railroads sued to recover demurrage charges on certain shipments of cotton linters, and the issue was whether the action was barred by a three-year statute of limitations applicable to actions by carriers. The Supreme Court held that the statute did not apply to actions brought by the Government.

Pacific Coast Steel Co. v. McLaughlin, a Ninth Circuit case, was decided three years before *Commissioner v. Bryson,* upon which we rely, and must be considered overruled by *Bryson* on the point under discussion.

It is true that in the *McCarthy* case this Court quoted from Mr. Justice Sutherland's opinion in *DuPont* the statement, "Statutes of limitation sought to be applied to bar rights of the Government, must receive a strict construction in favor of the Government." (80 F. 2d at 620). However, *McCarthy* was decided by this Court less than four months after its decision in *Bryson,* and the Court's opinion in each case was written by Judge Garrecht. The opinion in *McCarthy* contains no reference to *Bryson,* and it should not be easily assumed that the Court intended to reverse the rule approved in *Bryson*, in view of these facts. As has been shown, the *DuPont* case, from which the quotation is taken, did not involve a tax statute. *McCarthy* itself involved the effect of a waiver extending the period for assessment which the parties had stipulated was "executed" by the taxpayer, but which the taxpayer claimed had not been properly filed or consented to by the Commissioner.

Loewer Realty Co. was decided in the Second Circuit in 1929, prior to the Supreme Court's decision in *Updike* and the *Bryson* case in this Court, upon which we rely.

There must still be considered the passage quoted from Mertens in appellee's brief (p. 17, footnote 2). This is apparently appellee's sole authority for the statement that "since deciding the *Bowers* case, the Supreme Court has been active in stopping attacks based on the statute of limitations which have been made following its ambiguous statement in that case." (Br. 16). Appellee cites not one Supreme Court deci-

sion in support of this statement, and the only Supreme Court case cited by Mertens as evidence of any change of position since the *Bowers* case is *Stearns v. United States* (1934), 291 U.S. 54, 54 S.Ct. 325.

The *Stearns* case was a taxpayer's suit for refund. The issue presented was whether an assessment was invalid where the waiver relied upon by the Government had been signed by the taxpayer, but not by the Commissioner. It was held that the evidence supported a finding that the Commissioner had approved the extension in writing, as required by the Code, and that, in any event, the taxpayer was estopped to assert the statute of limitations. The opinion does not discuss the question of whether the statute of limitations is to be strictly construed in favor of the government or the taxpayer, nor does it cite *Bowers* or *Updike.*

It is submitted that the Supreme Court's statement in the *Updike* case, approving "the rule which requires taxing acts, including provisions of limitation embodied therein, to be construed liberally in favor of the Taxpayer," remains a correct statement of the law on this point. This view was accepted by this Court in *Bryson* in 1935, and neither the Supreme Court nor this Court has seen fit to change its view. Merten's statements to the contrary must be regarded as editorial comment rather than a statement of the law.

CONCLUSION.

The issue presented in this appeal has been considered in only one reported decision: *United States v. City of New York,* decided in the District Court for the Southern District of New York in 1955. That case was incorrectly decided, and should not be followed.

This suit against appellant was barred by the six-year statute of limitations, under Section 276(c) of the Internal Revenue Code of 1939, and the judgment should therefore be reversed and judgment entered in favor of appellant.

Dated, Oakland, California,
November 18, 1957.

Respectfully submitted,
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